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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 James EK Francis,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
14

No. CV-18-08014-PCT-JAT

ORDER

15
16 Pending before this Court is Petitioner James Francis’s Petition for Writ of Habeas
17 Corpus (“Petition”). (Doc. 1). The Magistrate Judge issued a Report and Recommendation
18 (“R&R”) recommending that the Petition be denied and dismissed because it is barred by
19 the Antiterrorism and Effective Death Penalty Act’s (“AEDPA”) statute of limitations and,
20 alternatively, is either procedurally defaulted or procedurally barred. (Doc. 12 at 4–11).
21 The R&R further recommended that a Certificate of Appealability be denied. (*Id.* at 11).
22 Petitioner filed an Objection to the Report and Recommendation (“Objection”). (Doc. 13).

23 **I. REVIEW OF AN R&R**

24 This Court “may accept, reject, or modify, in whole or in part, the findings or
25 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that
26 the district judge must review the magistrate judge’s findings and recommendations de
27 novo *if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114,
28 1121 (9th Cir. 2003) (en banc). District courts are not required to conduct “any review at

1 all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140,
2 149 (1985); *see also* 28 U.S.C. § 636(b)(1) (“[T]he court shall make a de novo
3 determination of those portions of the [R&R] to which objection is made.”). In this case,
4 Petitioner filed an Objection, (Doc. 13), and the Court will review the relevant portions of
5 the R&R de novo.

6 **II. FACTUAL AND PROCEDURAL BACKGROUND**

7 The R&R summarized the factual and procedural history of this case and neither
8 party objected to this history. (Doc. 12 at 1–4). Therefore, the Court adopts that portion of
9 the R&R.

10 **III. STATUTE OF LIMITATIONS**

11 The R&R recommends that the Petition be denied as barred by the AEDPA’s statute
12 of limitations. (*Id.* at 4–8). As explained by the Magistrate Judge, the AEDPA provides a
13 one-year statute of limitations for state prisoners to file a petition for writ of habeas corpus
14 in federal court. (*Id.* at 4); *see also* 28 U.S.C. § 2244(d). That period generally commences
15 on “the date on which the judgment became final by the conclusion of direct review of the
16 expiration of the time for seeking such review.” (*Id.* (quoting 28 U.S.C. § 2244(d)(1)(A))).
17 Examining Petitioner’s procedural history in state court, the Magistrate Judge determined
18 that Petitioner’s conviction became final on November 1, 2011. (*Id.* at 5). Therefore,
19 AEDPA’s one-year statute of limitations period commenced the next day and expired on
20 November 1, 2012. (*Id.*). Consequently, the Petition filed in January 2018 is untimely
21 absent any statutory or equitable tolling. (*Id.*).

22 Regarding statutory tolling, the Magistrate Judge explained that the “AEDPA
23 provides for tolling of the limitations period when a ‘properly filed application for State
24 post-conviction or other collateral review with respect to the pertinent judgment or claim
25 is pending.’” (*Id.* (quoting 28 U.S.C. § 2244(d)(2))). An untimely application is never
26 “properly filed” within the meaning of Section 2244(d)(2). (*Id.* (citing *Pace v. DiGugliemo*,
27 544 U.S. 408, 414 (2005))). Petitioner never filed a PCR notice, and his 2016 motion for
28 clarification—assuming *arguendo* it is a PCR notice under A.R.S. § 13-4234—was filed

1 “after the statute of limitations expired.” (*Id.* at 6). Therefore, the Magistrate Judge
2 concluded that “no statutory tolling applies.” (*Id.*).

3 Turning to equitable tolling, the Magistrate Judge explained that the Ninth Circuit
4 permits “equitable tolling of AEDPA’s limitations period ‘only if extraordinary
5 circumstances beyond a prisoner’s control make it impossible to file a petition on time.’”
6 (*Id.* (quoting *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999))). To receive equitable
7 tolling, “a petitioner must show ‘(1) that he has been pursuing his rights diligently and (2)
8 that some extraordinary circumstances stood in his way’ to prevent him from timely filing
9 a federal habeas petition.” (*Id.* (quoting *Holland v. Florida*, 560 U.S. 631, 645 (2010))).
10 Petitioner did not argue for, and the record does not suggest that, equitable tolling applies.
11 (*Id.*). Accordingly, the Magistrate Judge concluded that Petitioner is not entitled to
12 equitable tolling. (*Id.* at 6–8).

13 Finally, the Magistrate Judge noted that a finding of actual innocence can excuse
14 the untimeliness of a federal habeas petition. (*See id.* (citing *McQuiggen v. Perkins*, 569
15 U.S. 383, 391–96 (2013))). For the excuse to apply, a “petitioner must make a credible
16 showing of ‘actual innocence’ by ‘persuad[ing] the district court that, in light of the new
17 evidence,’ no juror, acting reasonably, would have found him guilty beyond a reasonable
18 doubt.” (*Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995))). Noting that Petitioner
19 “did not argue” for actual innocence, the Magistrate Judge concluded that he did not qualify
20 for this excuse. (*Id.*).

21 Based on Petitioner’s failure to file his habeas action within the statute of limitations
22 and his failure to state a sufficient basis for statutory tolling, equitable tolling, or actual
23 innocence, the Magistrate Judge concluded that the Petition must be dismissed with
24 prejudice as untimely. (*Id.* at 4–8).

25 **IV. Petitioner’s Objections**

26 Petitioner’s Objection did not address the AEDPA’s statute of limitations, statutory
27 tolling, equitable tolling, or actual innocence. (Doc. 13). Instead, the Objection raised
28 arguments going to the merits of Petitioner’s Petition. *See, e.g.,* (*Id.* at 9 (“The Arizona

1 statutory scheme for protection of child molestation rest upon the improper assignment of
2 the burden of disproving, or negating, ‘sexual motivation’ implicit in the offense to accused
3 by a preponderance of the evidence at trial.”)). Accordingly, Petitioner does not object to
4 the Magistrate Judge’s application of the AEDPA’s statute of limitations to his procedural
5 history or the determination that Petitioner’s one-year statute of limitations had expired
6 because Petitioner failed to establish that statutory tolling, equitable tolling, or actual
7 innocence should apply. (Doc. 13). The Court therefore accepts those recommendations.

8 **V. ALTERNATIVE RECOMMENDATION OF THE R&R**

9 The R&R alternatively recommends that even if the Petition were timely, the
10 Petition should be denied because Petitioner’s claims are procedurally defaulted or were
11 procedurally barred, and thus are barred from federal habeas review. (*Id.* at 8–9 (citing
12 *Beatty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002))). Petitioner does not object to these
13 findings by the Magistrate Judge.

14 Because the Court has concluded that the Petition is untimely, the Court will not
15 reach the alternative recommendations in the R&R regarding Petitioner’s state remedies
16 on his claims being procedurally defaulted or procedurally barred. Accordingly, all of the
17 objections are overruled.

18 **VI. Certificate of Appealability**

19 The R&R recommends that the Court deny a certificate of appealability. (*Id.* at 11).
20 Petitioner does not object to this recommendation. The Court agrees with the R&R because
21 “dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would
22 not find the procedural ruling debatable.” (*Id.* at 11–12); *see Slack v. McDaniel*, 529 U.S.
23 473, 484 (2000).


24 **VII. Conclusion**

25 Based on the foregoing,

26 **IT IS ORDERED** that the Report and Recommendation (Doc. 12) is accepted and
27 adopted; the Objection (Doc. 13) is overruled. The Petition is thus denied with prejudice,
28 and the Clerk of the Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the Court denies issuance of a certificate of appealability pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the event Petitioner files an appeal.

Dated this 7th day of February, 2019.


James A. Teilborg
Senior United States District Judge